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In the Supreme Court of the United States

OCTOBER TERM, 1976

HAWAIIAN HAULING SERVICE COMPANY, LTD., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-14a) is reported at 545 F. 2d 674. The Board's decision and order (Pet. App. 15a-25a) are reported at 219 NLRB 765.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1976. A timely petition for rehearing was denied on December 30, 1976 (Pet. App. 1a). The petition for a writ of certiorari was filed on March 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board acted within its authority in refusing to defer to an arbitrator's award that upheld the discharge of an employee for remarks made during a grievance meeting, and properly concluded that the discharge violated Section 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. App. 27a-28a.

STATEMENT

1. Joseph Richardson had been employed by petitioner Hawaiian Hauling Service Company, Ltd. (the "Company") for 22 years and had served as a Union[1] shop steward for the last 14 years. In October 1973, Richardson received two warning letters from the Company's vice-president and general manager, Kelly Rogers. The first letter involved a leave of absence that Richardson had taken commencing August 8, 1973. The second letter involved pornographic pictures that Richardson had placed on his desk in January 1972 and May 1973 and left there until October 3, 1973, when Rogers ordered them removed. (Pet. App. 15a.)

On October 15, 1973, Richardson and Union Business Representative DeCosta met with Rogers and Supervisor Abel Medina to discuss the warning letters. DeCosta informed Rogers and Medina that the Union wanted the warning letters removed from Richardson's file. Rogers declined to remove them. DeCosta then asked Rogers

[1]Hawaii Teamsters and Allied Workers, Local 996.

whether he had ever seen the pictures on Richardson's desk prior to October 1973. When Rogers denied that he had, Richardson called him a liar. Rogers discharged Richardson on the spot, admittedly because of Richardson's accusation. (Pet. App. 15a.)[2]

The Union challenged the discharge through arbitration under the procedures provided in the collective bargaining agreement. The Union contended that Richardson's conduct at the October 15 meeting was activity protected by Section 7 of the Act, 29 U.S.C. 157, and hence could not be made the basis for discharge. The Company, while conceding that the discharge was triggered by Richardson's accusation, contended that Richardson's conduct in this respect was not protected by the Act, and that the discharge was justified. The parties agreed that the arbitrator's decision would contain only his conclusions and would not contain any comments on the evidence. On February 26, 1974, the arbitrator issued an unexplained award in which he ruled that "the discharge in question was proper" (Pet. App. 15a).

On July 24, 1974, the General Counsel of the Board issued a complaint alleging that the Company had discharged Richardson in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). In its answer the Company contended that Richardson was discharged because of his unprotected activities and that the Board should defer to the arbitration award (Pet. App. 18a). The administrative law judge agreed to defer to the award and recommended dismissal of the complaint.

[2]Rogers admitted that he would not have terminated Richardson if the latter had not called him a liar (Pet. App. 15a n. 2, 23a).

2. The Board,[3] however, declined to defer to the arbitrator's award, concluding that it was repugnant to the policies of the Act. The Board found that Richardson's remarks at the grievance meeting were protected activity and held that his discharge for those remarks violated Section 8(a)(1) of the Act. (Pet. App. 15a-18a.)

In its opinion the Board stressed that Richardson admittedly would not have been discharged but for his remarks at the October 15 meeting (Pet. App. 15a). It concluded that the effect of the arbitrator's award upholding the discharge was to "substantially dilute an employee's right to fully present his case during grievance and arbitration proceedings as the employer's equal" (*ibid.*). The Board further reasoned (Pet. App. 16a):

> Precluding a union from calling into question the credibility of management witnesses and requiring it to accept management's factual assertions would so heavily weigh the mechanism in the employer's favor as to render it ineffective as an instrument to satisfactorily resolve grievances. The grievance and arbitration mechanism is a vital cog in the machinery for the resolution of industrial disputes. An arbitrator's award which tends to destroy the effectiveness of that mechanism, as the arbitrator's award here does, is clearly repugnant to the policies of the Act. [Footnote omitted.]

3. A divided court of appeals held that "[t]he Board did not abuse its wide discretion in thus characterizing the effect of the arbitral decision and in refusing to defer to the award" (Pet. App. 10a). The court noted that "[t]he Board's decision was well within the rationale of *Crown Central Petroleum Corp.* v. *NLRB* (5th Cir. 1970) 430 F. 2d 724," which

[3]Members Kennedy and Penello dissented from the decision.

recognized that grievance meetings often generate high emotions, that epithets and accusations are commonplace, and that such remarks are "protected activities in this setting" (*ibid.*). The court accordingly sustained the Board's findings and enforced its order.

ARGUMENT

The decision of the court of appeals sustaining the Board's refusal to defer to the arbitrator's award is correct and not in conflict with decisions of this Court or other courts of appeals. No issue warranting review by this Court is presented.

Under Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), the Board has exclusive authority to adjudicate and remedy unfair labor practices. See *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, 435-437. That Section specifically provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * * ." Thus it is clear that the existence of an arbitration award does not oust the Board of jurisdiction to adjudicate unfair labor practices involving the same subject matter. *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 360-362.

The Board does have a long-standing policy of deferring to an outstanding arbitral award where it has resolved the pending unfair labor practice issue in a manner not repugnant to the Act, where the procedure followed was fair and regular, and where all parties agreed to be bound by the award. See *Spielberg Mfg. Co.*, 112 NLRB 1080. The Board's post-award deferral policy has been noted with approval by this Court. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 271; *National Labor Relations Board* v.

Plasterers' Union, Local 79, 404 U.S. 116, 136-137; *Arnold Co.* v. *Carpenters District Council*, 417 U.S. 12, 16-17. See also *Associated Press* v. *National Labor Relations Board*, 492 F. 2d 662, 666-667 (C.A. D.C.); *National Labor Relations Board* v. *International Longshoremen's & Warehousemen's Union, Local 27*, 514 F. 2d 481, 483 (C.A. 9); *John Klann Moving & Trucking Co.* v. *National Labor Relations Board*, 411 F. 2d 261, 263 (C.A. 6), certiorari denied, 396 U.S. 833. But the fact that the Board may in its discretion elect to defer to the arbitral process does not mean that it is compelled to do so (*National Labor Relations Board* v. *Strong, supra*); if it elects to assert jurisdiction, its decision takes precedence over conflicting arbitral awards enforcing private contract rights (*Carey* v. *Westinghouse Corp., supra*, 375 U.S. at 272).

In the present case the Board reasonably exercised its discretion in declining to defer to an arbitrator's award that it found repugnant to the policies of the Act. See *Radio Television Technical School, Inc.* v. *National Labor Relations Board*, 488 F. 2d 457 (C.A. 3); *Dreis & Krump Mfg. Co., Inc.* v. *National Labor Relations Board*, 544 F. 2d 320 (C.A. 7); *Spielberg Mfg. Co., supra*, 112 NLRB at 1082. The Board has long held, with court approval, that in a bargaining or grievance context an employee is free to question the veracity of employer representatives without losing the protection of the Act. This view recognizes that grievance meetings often are highly charged confrontations that require a special atmosphere of freedom to insure that the parties are truly equal. Accordingly, discipline or discharge of an employee for use of profanity or epithets such as "liar" during a grievance meeting violates Section 8(a)(1) of the Act. See *Crown Central Petroleum Corp.* v. *National Labor Relations Board*, 430 F. 2d 724 (C.A. 5); *Dreis & Krump Mfg. Co., Inc.* v. *National Labor Relations Board, supra*, 544 F. 2d at 328-329; *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 60-61; *Hugh H. Wilson Corp.* v. *National Labor Relations Board*, 414 F. 2d 1345 (C.A. 3), certiorari denied, 397 U.S. 935; *American Telephone & Telegraph Co.* v. *National Labor Relations Board*, 521 F. 2d 1159 (C.A. 2); *Bettcher Mfg. Corp.*, 76 NLRB 526, 527. The arbitrator's award here is incompatible with those decisions giving statutory protection to employee statements made in the course of a grievance meeting and, as the Board found (Pet. App. 15a), would "substantially dilute an employee's right to fully present his case during grievance and arbitration proceedings."

There is no substance to petitioner's contentions (Pet. 7-16) that the Board improperly refused to credit the arbitrator's factual and credibility determinations. The decision of the arbitrator contained no specific findings at all, merely reciting that the "discharge in question was proper" (Pet. 4). Although the arbitrator might have concluded that the discharge was proper only because he believed that Richardson had deliberately lied, it is equally plausible that he believed that Richardson was telling the truth (or simply mistaken) but regarded his outburst as sufficiently insubordinate to justify dismissal. Under these circumstances, the Board was not required to assume that the arbitrator's decision rested upon a particular factual determination rather than upon a legal determination at odds with the policies of the National Labor Relations Act.[4]

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[4]There is no conflict in the circuits on this question. The cases cited by petitioner (Pet. 10) suggest only that courts generally should not review the merits of arbitrators' decisions on direct review; they do not hold that the Board is bound by such decisions or that courts of appeals are somehow disabled from enforcing Board orders when the Board has declined to defer to an arbitrator's decision and has found a violation of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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